INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	4
Argument	8
Conclusion	16

CITATIONS

Cases:

Federal Power Commission v. *Interstate Natural Gas Co.*, 336 U.S. 577	8, 10, 11, 12, 13
Federal Power Commission v. *Sunray DX Oil Co.*, 391 U.S. 9	13
Hunt Oil Co., 30 FPC 220	4, 13
Midwestern Gas Transmission Co., 32 FPC 993	10
Northern Natural Gas Co. v. *Federal Power Commission*, 215 F. 2d 892	10
Texas Gas Transmission Corp., 26 FPC 924	15
United Fuel Gas Co. v. *Federal Power Commission*, 367 F. 2d 34	10
United Gas Improvement Co. v. *Callery Properties, Inc.*, 382 U.S. 223	13
United Gas Pipe Line Co., 27 FPC 504	15

Statutes: Page

Natural Gas Act, June 21, 1938, c. 556, 52 Stat. 821-833, as amended, 15 U.S.C. 717-717w 13
Section 4, 15 U.S.C. 717c 13
Section 4(e), 15 U.S.C. 717c(e) 2, 7, 8, 9, 12

Miscellaneous:

Federal Power Commission, *Forty-Third Annual Report* (1963) 4, 14

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-37) is reported at 414 F. 2d 344. The original opinion and order (No. 540) of the Federal Power Commission (Pet. Supp. 2-30)[1] is reported at 39 FPC 630. The Commission's opinion and order

[1] "Pet. Supp." references are to the separate supplement to the petition for a writ of certiorari.

(Opinion No. 540-A) denying petitioner's application for rehearing (Pet. Supp. 32-37) is reported at 40 FPC 62.

JURISDICTION

The judgment of the court of appeals (R. 781) affirming the Commission's orders was entered June 20, 1969. A petition for rehearing was denied December 30, 1969 (R. 793), and the present petition was filed March 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Commission, having found refunds to be due from a supplier of natural gas sold in interstate commerce for resale, has authority to require the refunds to be passed on to the jurisdictional customers of the purchasing utility.

2. Whether the Commission and the court below properly concluded that the exercise of such authority here was in no way inconsistent with any rate settlements previously approved by the Commission.

STATUTE INVOLVED

Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), 52 Stat. 822, provides:

> Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State com-

mission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natu-

ral-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

STATEMENT

Introduction.—In the early 1960's the Commission disposed of a substantial number of natural gas pipeline rate cases and ordered refunds of several hundred million dollars. A subsequent survey revealed that not all of this money had been passed on to the ultimate consumers or even beyond the immediate pipeline purchasers. See F.P.C., *Forty-Third Annual Report* (1963), p. 127. Accordingly, the Commission announced in 1963 that it would, where appropriate, order the utilities liable for the refunds to hold them pending a decision on whether further proceedings would be required to determine who was entitled to receive the refunds. *Hunt Oil Co.*, 30 FPC 220, 222-223.

This case arises out of a proceeding, forecast by the *Hunt Oil* announcement and initiated October 4, 1965 (R. 666-674A, 34 FPC 1099), to determine the extent, if any, to which petitioner (a pipeline company) was entitled to certain sums collected from it which the Commission had ordered its suppliers to

refund (R. 672). The Commission, after the hearing, held that petitioner had not established its entitlement to the refunds and remanded the case to its examiner to consider certain further matters relating to the disposition of the refunds in favor of the ultimate consumer (Pet. Supp. 29-30). The refunds specifically involved in this proceeding are in excess of $10 million (Pet. Supp. 3) and represent the disallowed portions of rate increases collected by Texas Eastern's suppliers during the years 1961-1964, inclusive.

Throughout the period in question, petitioner charged rates, established in a settlement approved by the Commission in 1961 (R. 290-334, 25 FPC 172), based on a cost of service reflecting gas purchase costs through October 27, 1959, and allowing rates of return of 6 to 6.25 percent (R. 303-304, 333-334). The cost of service was based in part on suppliers' contingent rates and petitioner agreed to flow through to its customers refunds that it might receive from its suppliers with respect to specified contingent rates (see R. 294-295, 307, 320-322). The settlement was, however, silent as to refunds that petitioner's suppliers might be obligated to make with respect to rate increases filed after October 27, 1959; it is such refunds that are in issue here.

The Commission Proceeding.—The uncontradicted evidence before the Commission showed that, even though petitioner had paid the higher contingent rates of its suppliers without filing tracking rate increases to pass the increased costs on to its customers, it had realized after-tax rates of return of 6.59,

6.81 and 6.91 percent, respectively, in the years 1962, 1963 and 1964 (R. 583-606).[2] The highest rate of return theretofore allowed by the Commission for any major pipeline had been 6.5 percent (R. 670).

The Commission affirmed the examiner's findings and conclusions (R. 680-723) that petitioner had earnings during the years 1962-1964[3] in excess of a reasonable rate of return, and had failed, therefore, to show entitlement to the refunds (R. 687-688, 702). It also held, as had the examiner, that petitioner's 1961 settlement did not govern the disposition of the refunds here at issue (R. 700-701). The Commission explained that the mere fact that a pipeline had "absorbed" increased supplier costs, in the sense that it had not filed tracking increases, should not automatically entitle it to the refunds if, as here, it nonetheless had enjoyed earnings in excess of a reasonable rate of return. Indeed, under such circumstances, the filing of tracking rate increases would have exposed the pipeline to the possibility of a rate reduction (Pet. Supp. 14-16). The Commission stated that, because it had not in the past announced a firm policy with respect to untracked rate increases, it had given petitioner an opportunity to show that

---

[2] Petitioner's pre-hearing "report" that it had earned less than 6.5 percent in the years 1962-1964 (Pet. 8, n. 3) was unsupported.

[3] The Commission staff had presented no evidence as to petitioner's earnings in 1961 as to which refunds were also applicable. The Commission held that the burden of showing entitlement was petitioner's and that it had failed to carry that burden with respect to either 1962-1964 or 1961 (Pet. Supp. 34-35).

it was entitled to the refunds, but that claims to refunds accruing in the future would not be permitted to be premised on the failure to track increases or on claimed revenue deficiencies during the period of accrual (Pet. Supp. 16-20).

The Commission further determined that the ultimate gas consumers should be the beneficiaries of the refunds at issue and accordingly ordered the refunds to be flowed through to the extent of the Commission's jurisdiction. Thereafter it would be within the jurisdiction of local regulating bodies to decide their ultimate disposition. The Commission noted that the California and New York commissions had stated their intentions to assure that the ultimate consumers would be the beneficiaries of refunds flowed through to local distributors (Pet. Supp. 11-12).

The Decision Below.—The court of appeals affirmed the Commission in all respects (Pet. App. 27-37). Interpreting the power of the Commission to order refunds under Section 4(e) of the Natural Gas Act in light of the overriding purpose of the Act to protect consumers, the court rejected petitioner's claim that its "absorption" of the increases automatically entitled it to the refunds (Pet. App. 31-34). The court also found that the Commission's past actions did not bar the adoption of a new refund policy, that the Commission's order was not a reparations order, and that the entitlement to the refunds was not governed by the 1961 settlement agreement of petitioner's rates or by Commission orders disposing of other supplier rate increases (Pet. App.

34-36). Finally, the court of appeals found the Commission's order rationally based, noting that, although there was no guarantee that the ultimate consumers would benefit from the refunds, there would be no way for them to be benefitted unless the Commission ordered the refunds flowed through so as to be subject to the jurisdiction of the state regulatory agencies (Pet. App. 36-37).

ARGUMENT

The question whether the Commission in ordering refunds under Section 4(e) of the Natural Gas Act may require the immediate purchaser to flow them through to its customers so as to permit reimbursement to the ultimate consumer is concededly one of general interest and importance. The present case represents the Federal Power Commission's first formal and comprehensive consideration of this problem. Nevertheless, we do not think that the case calls for further review by this Court as the unanimous decision below is plainly correct, conflicts with no other decision, and was foreshadowed by this Court's decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, dealing with the disposition of funds accumulated under a stay.

1. Under Section 4(e) of the Natural Gas Act, the Commission clearly has the authority to order refunds of amounts collected during the pendency of rate increase proceedings. No requirement that the refunds be paid to immediate purchasers is imposed. Indeed, as the Commission and court below concluded, such a requirement would be plainly inconsistent

with the Act's overriding purpose of protecting the ultimate gas consumers.

Petitioner's attempt to find a restriction on the ultimate recipient of refunds in the Section 4(e) requirement that a utility receiving a contingently increased rate "keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid" was properly rejected by the court below (Pet. App. 32). This accounting provision does not purport to specify who is ultimately entitled to the refunds.

2. Petitioner's underlying thesis in attacking the Commission's authority to pass the refunds on to petitioner's customers is that its abstention from raising its own rates to track its suppliers' increases in rates entitles it automatically to any later refunds the suppliers might be required to make. Such a disposition, it is argued, would restore the situation to what it would have been if its suppliers had not originally been granted the contingent rate increases. As the record establishes, this assumption cannot be supported.

The evidence before the Commission established that even after absorbing the increased gas purchase costs imposed upon it, Texas Eastern's after-tax rates of return from 1962-1964 were well above the 6.25 percent return limit which formed the basis of the 1961 Texas Eastern rate settlement. Had increased gas purchase costs not been imposed during these years, the pipeline's rates of return would have been substantially higher, rendering it more likely

that the Commission or one of petitioner's customers would have instituted rate reduction proceedings against petitioner.

If petitioner, on the other hand, had filed for a rate increase to track the increased costs contingently charged by its suppliers, it is probable that the Commission not only would have disallowed the rate increase and have required, in accordance with its regular practice (see, *e.g.*, *Midwestern Gas Transmission Co.*, 32 FPC 993, 1003, 1005), the flow through of any refund received in the future from its suppliers resulting from contingent increases, but would have reduced petitioner's existing rates.

Contrary to the claim of petitioner (Pet. 15-19), the Commission's decision plainly gave full consideration to relevant equitable principles and was fully consistent with this Court's decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577.[4] In *Interstate* the Court was faced

---

[4] The other alleged conflicts (Pet. 17-19) are also nonexistent. In *Northern Natural Gas Co.* v. *Federal Power Commission*, 215 F. 2d 892 (C.A. 8), the court, to be sure, concluded that distributors who had not increased their rates during the period of the court stay were entitled to a refund for their own benefit of excess amounts paid by them. But the court made clear the limited character of its ruling. At the time it issued its stay the court had, in effect, invited the distributors not to track. The court had stated its belief the stay would be of short duration, during which time there probably would not be sufficient time for distributors to obtain approval of rate increases, and that the effect on individual consumers would probably be too small to warrant court proceedings to determine entitlement. 215 F. 2d at 897.

United Fuel Gas Co. v. *Federal Power Commission*, 367 F. 2d 34 (C.A. 4), also plainly poses no conflict. There the

with the question of the proper distribution of a fund created by a natural gas supplier during a judicial stay of a rate decrease ordered by the Commission; it recognized that the intermediate pipeline companies which had paid the high rates might be entitled to the fund either if their own rates had been unreasonably low or if they had passed on the rate reductions to their customers at the time of the Commission's original order. But, the Court held, "apart from those exceptions, it is the duty of the court [which was required to dispose of the fund its stay had created] to look beyond those companies for the rightful claimants of the fund" in accordance with equitable principles (336 U.S. at 582). Moreover, the Court noted that the ultimate consumers of natural gas were "the intended beneficiaries of rate reductions ordered by the federal commission, though state machinery might have to be invoked to obtain lower rates at the consumer level" (*id.* at 581).

The present case involves neither of the circumstances that the Court in *Interstate* indicated would justify a refund to the pipeline company. Texas Eastern's earnings during the period in question were not low, and the "absorption" of the supplier rate *increases* is not the equivalent of a tracking rate *reduction* in the *Interstate* situation. Whereas a

---

court, without reaching the merits, dismissed as premature an order directing a supplier to withhold refunds pending the Commission's decision as to the proper distribution. The fact that the court stated that there had to be a determination as to "who bore the burden of the excessive rates" plainly does not aid petitioner since, as we have shown, Texas Eastern in fact did not bear any burden from its suppliers' excessive rates.

change in rates, up or down, exposes a pipeline company's revenue position to Commission analysis and evaluation, Texas Eastern's unilateral conclusion that it was satisfied with the status quo despite its suppliers' increases gave no assurance whatever that its own charges were in fact just and reasonable. Under these circumstances, the Commission properly determined that the consumers are the rightful claimants of the refunds, and did everything within its jurisdictional power to assure that they would receive them.[5]

3. Petitioner's attempt (Pet. 14-15) to equate the Commission's requirement that refunds be paid to its jurisdictional customers with reparations (which neither the Commission nor the courts concededly have the power to order) is also without substance. This Court held in *Interstate* that the determination of the equitable entitlement to a fund created because

---

[5] Petitioner surprisingly asserts (Pet. 10) that the Commission's response to the petition for rehearing before the court of appeals "acknowledged that its orders would produce 'an inequitable result' because a substantial portion of the refunds would not be flowed through to consumers but would be retained by Texas Eastern's customers." The three-word phrase quoted by petitioner appears in the context of a discussion pointing out that in view of the interplay of federal and state regulatory responsibilities the distribution of refunds to retail customers, whether under a stay as in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, or under a Section 4(e) proceeding, depends ultimately on a State determination of the relative equities between the distributor and its customers even if that State determination "leads to what the F.P.C. might believe is an inequitable result as between parties to contracts subject to its jurisdiction" (R. 784, p. 7).

of the pendency of rate litigation is not ratemaking, explaining that (336 U.S. at 582-583):

> * * * If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. * * * The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it.

See also *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229-230; *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, 44-45.

4. Apparently conceding the Commission's authority to initiate a prospective policy of requiring refunds to be flowed through to the jurisdiction of local regulatory agencies, petitioner claims that it has been subjected to an improper retroactive application of the policy (Pet. 19-22).[6] As the court below noted (Pet. App. 34-35), such a policy had not been specifically rejected in the past, but had gradually developed over the years in a manner typical of the administration of the Natural Gas Act.[7] Moreover, recognizing

---

[6] The excess charges on which the refunds were based were collected in the period 1961-1964 (Pet. Supp. 3). The Commission gave notice on July 16, 1963, *Hunt Oil Co.*, 30 FPC 220, 222-223, that it would no longer assume that refunds made to the immediate purchaser carried out the consumer-protection purpose of the Act.

[7] The problem of flowing through refunds involved here arises in the context of Section 4 increase proceedings. During the early administration of the Gas Act, there were practically

the novelty of its ruling, the Commission afforded petitioner an opportunity, not to be granted with respect to refunds accruing in the future, to show that its rates or return were below the just and reasonable level during the period when it paid the excess charges (Pet. Supp. 18-20). The evidence developed, however, demonstrated that petitioner's rates of return, without taking the refunds into account, were excessive. In short, the Commission's determination that the policy of the Act requires that refunds be flowed through to those who can be ordered by state agencies to pass them on to consumers was both rational and equitably applied in this case.

5. Petitioner's separate claim (Pet. 22-24) that the action here will impair future reliance on settlements to resolve rate disputes rests on its suggestion that the terms of prior settlements were ignored by the Commission and the court below. There is no question but that such settlements are binding on matters governed thereby; the Commission and the court of appeals merely rejected petitioner's construction of the settlements. Petitioner has seized upon orders approving settlements of rate increase proceedings by its suppliers[8] (Pet. 24) to claim that the Commission

---

no such proceedings. The Commission has only relatively recently become aware of the existence and extent of the problem of securing for ultimate consumers the benefits of refunds. See Federal Power Commission, *Forty-Third Annual Report*, p. 127. Until the problem became apparent, refunds when required were paid to the immediate customer—frequently a distribution company.

[8] Petitioner, however, apparently no longer challenges the self-evidently correct holdings below that its own 1961 set-

had made an irrevocable decision that petitioner was entitled to the refunds therein referred to because those orders either specified that the refunds were to be paid to jurisdictional customers [9] or listed the dockets, customers and amounts of refund in each docket.[10] As the Commission stated (Pet. Supp. 28-29) and the court below noted with approval (Pet. App. 36), however, those proceedings were concerned, not with the beneficiaries of the refunds, but solely with the lawfulness of the rates there at issue. Accordingly, the claim that the Commission's decision in this case will impede future use of settlements is clearly without merit.

---

tlement, based on gas costs as of October 27, 1959 (R. 320-333), did not bar the Commission's flow-through order here involved, relating to excess charges resulting from supplier rate filings after that date (Pet. App. 35-36; Pet. Supp. 26-28).

[9] *Texas Gas Transmission Corp.*, 26 FPC 924; R. 650-658.

[10] *United Gas Pipe Line Co.*, 27 FPC 504, R. 153-192.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,

PETER H. SCHIFF,
Solicitor,

ABRAHAM R. SPALTER,
Assistant General Counsel,
Federal Power Commission.

MAY 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 383895 669